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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-739

OLSON FARMS, INC., PETITIONER

v.

CACKLING ACRES, INC., *et al.*, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. B-1—B-14)[1] is reported at 542 F.2d 242.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered August 31, 1976. A Petition for Rehearing was denied October 13, 1976. The Petition for a Writ of Certiorari was filed November 26, 1976. The jurisdiction of this Court is established by 28 U.S.C. §1254(1).

[1] "Pet. App." refers to the appendix to the Petition for a Writ of Certiorari.

QUESTIONS PRESENTED

1) Whether petitioner is precluded from contending in this Court that there was insufficient proof of the fact of damage when petitioner did not raise the issue in the court below; and whether petitioner is precluded from challenging here the evidence of the measure of damages since the issue is not stated as a question presented.

2) Whether the Court of Appeals followed the decisons of this Court in determining that there was sufficient evidence for the jury to find damage in fact under Section 4 of the Clayton Act.

STATUTORY PROVISION INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. §15 provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States. . . .

STATEMENT OF THE CASE

Respondents, fourteen egg producers, all located in the State of Utah, filed this suit December 21, 1971, against Olson Farms, Inc. (hereafter "Olson"), the world's largest independent distributor of eggs (App. 1012).[2] All fourteen charged Olson, the petitioner, with: 1) conspiring with all other major distributors in

[2] "App." refers to the joint appendix filed by the parties in the Court of Appeals.

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Utah to fix depressed prices paid by the distributors to producers of eggs and to fix depressed wholesale prices in Utah and 2) conspiring to monopolize the production and distribution of eggs in the Utah market area.[3]

Four of the fourteen also charged Olson with attempting to monopolize the production and distribution of eggs in Utah. The claims were made under Sections 1 and 2 of the Sherman Act. Damages were sought for the period from December 21, 1968, through December 21, 1971. Olson filed a counterclaim against six plaintiffs, alleging that they had conspired to fix the prices paid by Olson for eggs at an artificially high level.

On March 21, 1974, after a two-month trial before the Honorable Aldon J. Anderson, a jury returned verdicts in favor of all the plaintiffs on each of the conspiracy claims and in favor of the four plaintiffs on the attempt to monopolize claim. The jury, on Olson's counterclaim, specifically found both no liability and no damage.

The trial court had instructed the jury that it must find both the fact of damage and a reasonable basis in the evidence for measuring the quantum of damages before it could return a verdict of liability with respect to any plaintiff as to each of the three claims

[3] The Utah market area was defined as the State of Utah with respect to distribution and Utah and Franklin County, Idaho, with respect to production.

made against Olson Farms (App. 1118, 1122, 1127). Olson has not contested the validity of those instructions either in the court below or in this Court.

The plaintiffs asserted the same theory as to the measure of damages suffered by them under each claim. The trial court instructed the jury to return separate verdicts on each of plaintiffs' three claims and on Olson's counterclaim. To avoid any confusion which might have resulted from multiple awards of damages to the same plaintiff, the trial court instructed the jury that if it found Olson liable to a plaintiff or plaintiffs on more than one claim that the amount of damages sustained by a plaintiff, if any, should be entered only under one of the claims. Since the jury found liability on all claims, which under the instructions necessarily included a finding of damage, the verdict against Olson under each claim established a right in each plaintiff to recover under each claim to which it was a party the amount of damage awarded by the jury, regardless of which claim the jury chose to put the money figure under. The lower court so ruled (Pet. B-11—B-12), and that ruling is not challenged here. Of course, the plaintiff was entitled to recover that amount only once. Thus, each plaintiff has a right to recover the damage awarded it either under the Section 1 conspiracy claim or under the Section 2 conspiracy claim.[4]

Olson argues that the only evidence of the fact of

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[4] The four plaintiffs asserting the attempt to monopolize claim also have a legal right to the damage award under that claim because of the finding of liability which necessarily included a finding of damage in fact and quantum of damages.

damage was the testimony of plaintiffs' expert who compared Utah producer prices with California producer prices plus transfer costs to Utah (Pet. pp. 5-6). Petitioner is in error. Evidence of the fact of damage was abundant and multi-faceted.

The evidence showed that Olson had a well-defined corporate policy for monopolizing a market by driving both producers and dealers out of business. A former Olson executive testified that Olson's philosophy was to always achieve "market dominance" in any market it entered (App. 11). To this end, employees were directed 1) to reduce the number of sellers and buyers in a market to prevent "wipsaws" over price (App. 31); 2) to take ten accounts of competitors for every account which a competitor took of Olson's (App. 12); 3) to seek to remove competitors by acquiring them (App. 14); and 4) to control the source of competitor's eggs, and, "if need be, attempt to keep those eggs from coming to the market," such as by purchasing them from the competitor's supplier or arranging to have them "diverted" from him (App. 11). These practices were used in the Utah market area.

Olson's manager was sent here with instructions to drive out of business all but two or three distributors in the Utah market by "whatever means were necessary" (App. 37-38). Olson's manager also stated there would be a "shakeout of producers [and that] there would be only six or seven producers left" (App. 71-72).

Olson and its co-conspirators engaged in a number

of predatory practices against both small dealers and egg producers pursuant to the conspiracy to monopolize. Olson penalized producers who refused to sell their entire supply of eggs to Olson by paying them 5 cents per dozen less for their eggs (Pl. Ex. 2) thereby depriving producers of their profit margin if they split their supply of eggs. This penalty was exacted regardless of the volume and quality of the eggs sold by the producer. The effect was to prevent producers from competing with Olson by selling directly to retail accounts. It also had the effect of diverting eggs from small dealers who once provided an element of competition in the market area. Olson and Countryside Egg Farms, a co-conspirator dealer, offered highly discriminatory prices to accounts of a small producer-dealer which attempted to sell directly to retailers. The prices offered by Olson and Countryside, were at or near the prices paid to producers by Olson to acquire the eggs (see App. 119-20, 122). Olson also agreed to divide territories and to allocate customers (e.g. App. 188-94). Independent documentary evidence from petitioner's own files established that petitioner was part of a conspiracy to depress producer and wholesale prices (Pl. Ex. 243). For the period 1968-1971 producers were paid prices that in some instances were barely above their costs and in many instances were *below* the cost of production (Def. Ex. 2; pl. Ex. 204; App. 980).

Olson's plan to monopolize the Utah market area entered its last stages in the last quarter of 1970 and the year 1971. In the latter part of 1970, Olson commenced operation, with two other co-conspirators,

of an egg production unit called "Oakdell Egg Farms" which was named as a defendant in this action.[3] Shortly before Oakdell commenced operation, Olson drove the price of eggs in Utah to levels that were at all time low levels. The prices paid by Olson and its conspirators to producers were on frequent occasions in 1971 *below direct costs.* (Compare Tr. 2938, Pl. Ex. 248, 249, 250). For a substantial portion of the latter part of 1970 and a large part of 1971, producer prices in Utah (although still a deficit area) were at or below the prices paid producers in the surplus area of southern California. Nevertheless, Olson Farms as a distributor made record profits in Utah in 1971, even a "monopoly profit" measured against standards in the industry (Df. Ex. WW, XX, Tr. 2661-62).

Olson's tactics were effective especially against producers. When Olson entered the Utah market in 1966, there were several hundred Utah producers of eggs (App. 201-02) and a number of independent distributors of eggs. The dealers competed in price for the eggs of Utah producers (e.g. App. 483-84, 1032). No such competition existed after Olson's entry into the Utah market (e.g. App. 177-178, 255, 256). Also after Olson's entry, Olson and its co-conspirator dealers "dictated" the prices producers were to receive (App. 375-377). Producer prices for a large part of the limitations period were held at, or barely above the costs of production (Def. Ex. 2; Pl. Ex. 204; App.

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[3] Oakdell Farms, Inc., was owned 50% by Olson Farms, and 50% by Paul and Marlow Woodward, both of whom were name co-conspirators.

980). As a consequence, there was a "marked increase" in the number of producers who went out of business (App. 147). By 1971, only four major independent distributors were still in operation in the Utah market area, and two of them, Olson and co-conspirator Countryside Egg Farms, controlled 72% of the distribution of eggs in the Utah market area, and all the co-conspirator dealers distributed over 90% of the eggs in Utah (Compare Pl. Ex. 83 with Tr. 874, 875); See also Pl. Ex. 275). By the time the Complaint was filed, there were only 17 commercial producers left in the State of Utah (App. 201-02). Fourteen of them are plaintiffs in this action, and the other three were named as co-conspirators.

The above demonstrates that the record is replete with evidence of the fact of damage, apart from plaintiffs' expert's testimony which went both to the fact and quantum of damage.

Plaintiff and defendant, to prove damages on their respective claims, relied on exactly the same basic formula—the formula that defendant now, for the first time and erroneously, claims is "not recognized by economic theory" (Pet. p. 8). The formula is that the price of eggs in a competitive deficit market (Utah) should equal the prices paid producers in the nearest surplus producing area, *i.e.*, Southern California, plus the "transfer costs" to Utah. This formula produces a "landed cost" in Utah.

The foundation for the economic theory was established primarily by plaintiffs' expert, Dr. Rondo Christ-

ensen,[6] who testified that under "competitive conditions, that if the local area were deficit in its production of eggs . . . that eggs would be imported from the nearest surplus area, which tends to be California" (App. 714). Dr. Christensen testified that to encourage production in the deficit area under normal competitive conditions, that the "local price" would reflect the price in California plus transfer costs, which is . . . *typical in all our [agricultural commodities]* (App. 845) (emphasis added). It was undisputed at trial that Utah was a deficit production area for the limitations period, and that California was the nearest surplus production area for the limitations period.

Petitioner's contention that the damage theory is not "recognized by economic theory" (Pet. p. 8), is simply erroneous. There is not a shred of evidence to support petitioner's contention.

Indeed Dr. Royce Anderson, an economic expert for Olson Farms, concurred in the basic economic theory

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[6] Dr. Christensen's qualifications as an expert are impressive. He has taught courses in marketing, farm accounting, farm and ranch accounting, cooperatives, public policy and research in the area of dairy marketing since 1957 (App. 612-13); has done research relating to marketing in the egg industry; substantial work in statistics in the areas of pricing, production, yields, and income (App. 613); has made statistical studies using state, federal, and private statistics for the benefit of farmers, ranchers and others (App. 613); has engaged in farm production planning, including projections on prices at given levels of production, yield, and income (App. 613); has authored sixty or seventy publications covering the above areas (App. 620-21); has had practical experience as an agricultural economist with the Bank of America and as an advisor to a marketing association for the United States International Agency for Development and the Bolivian Ministry of Agriculture (App. 617-618).

(Tr. 6719, 6737-38). In fact, defendant's damage exhibit itself was based on that exact same theory (see D-8, p. 2).

In other words, the dispute at trial on damages was what the cost to a distributor in Utah was for a California egg "landed" in Utah. Petitioner is simply in error in asserting that the plaintiffs attempted to compare Utah producer prices with California jobber prices (Pet. p. 6). All costs not associated with the cost of landing a California egg in Utah were disregarded in all the damage studies done by Dr. Christensen.

In short, the only difference between the plaintiffs and Olson Farms in computing the measure of damages was a strictly factual difference—what the amount of the "transfer costs" were. Defendant's expert testified that "the transfer cost was the cost of freight" (Tr. 6737), but admitted that he had never made a sudy to determine whether there were additional costs and admitted that there might be some (Tr. 6738-6741). Dr. Christensen's study of transfer costs was not theoretical; it was based upon the actual experience of Olson Farms, Safeway, and Associated Food Stores[7] in importing eggs from southern California over extended periods of time, and the costs they paid for importing those eggs whether imported from producers or from producer-dealers (see Pl. Exs. 90, 278, 285; App. 760-62, 844, 891-92). The experience of each

[7] Safeway and Associated Food Stores were also named as co-conspirators.

company amply supported the plaintiffs' position that transportation was not the only factor which had to be taken into account in arriving at the price of a "landed egg" in Utah. Additional breakage, handling charges, occasional double processing of eggs, and other costs are also incurred. Indeed, plaintiffs' estimate of the transfer costs was highly conservative measured by the experience of Olson Farms, Safeway and Associated Foods. At no time did plaintiffs compare Utah producer prices and California distributor prices as contended by Petitioner. (Pet. p. 6).

Finally, petitioner erroneously claims that there was no evidence to support the "premium for local freshness, dealer convenience," portion of plaintiff's damage exhibit (Pet. p. 6). In the first place, plaintiffs made no claim whatsoever for a premium for local freshness.[8] The amount claimed for dealer convenience did, however, have substantial support in the evidence, including the testimony of Olson Farms' Chief Executive Officer (App. 234, 902-03).

Finally, Olson's contention that historically the only differential that existed between California producer prices and Utah producer prices was the cost of transportation is not supported by the record. Many were aware that transfer costs included more than freight, but had no precise information as to additional costs. (See e.g. App. 398, 461-62, 540-41).

The petitioner did not contend in the court below

[8] The claim for a premium for freshment was dropped in the trial court.

that there was no evidence of the "fact of damage." Petitioner attacked the sufficiency of the evidence on the liability aspects of the case, and with respect to damages, charged that there was insufficient evidence to show the quantum of damages.[9]

The lower court, after canvassing the record of some 7,500 pages and several hundred exhibits, ruled it "would have been error for the trial court not to have submitted the case to the jury (Pet. B-8). It also specifically held that there was sufficient evidence of the fact of damage. The court stated (Pet. B-8—B-9):

> We think there was sufficient evidence of the *fact* that the plaintiff did sustain some damage, since there was ample statistical data and expert testimony describing depressed producer prices and the necessary concomitant—lots profits.

That court also referred to other evidence, apart from the statistical data and expert testimony, to support a finding of the "fact of damage." The court stated (Pet. B-6):

> There was certain documentary evidence . . . which, in our view, was quite damaging to Olson Farms and amply permitted the inference that Olson Farms was acting in concert with others *to depress the prices paid to Utah-Idaho egg producers* (emphasis added).

The court also noted, in connection with the causation issue (Pet. B-11):

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[9] See Brief of Olson Farms in the Court of Appeals, pp. 44-60.

> [The] instructions to the jury clearly indicated that the gravamen of each of the plaintiffs' first two claims, namely, the restraint of trade violation under Section 1, and the conspiracy to monopolize under Section 2, was that as a result of such activity, *the price of eggs paid by Olson Farms and other egg distributors to egg producers was fixed and depressed* (emphasis added).

ARGUMENT

The Petition for a Writ of Certiorari does not warrant plenary review by this Court. The sole issue presented for review by petitioner is whether the lower court properly applied the decisions of this Court "in considering the issue whether damage in fact had been proved" (Pet. p. 2). Petitioner does not contend that the decsion of the lower court is in conflict with any other court of appeals; nor does it contend that the case involves a novel legal principle under the antitrust laws which will have any application beyond the confines of this case. The dispute is solely a factual dispute which was properly decided by a jury and properly affirmed by the court of appeals, even though the issue of the "fact of damage," as such, was not presented to the lower court. Furthermore, Petitioner did not raise the sufficiency of the evidence as to "fact of damage" in the court below. For these reasons, we submit that the Petition for the Writ should not be granted.

1. In the section of the Petition entitled "Reasons for Granting the Writ" (Pet. p. 10), petitioner claims

that plaintiffs failed to show the "fact" of damage. *Story Parchment Co. v. Paterson Paper Co.*, 282 U.S. 555 (1931) stands for the proposition that a jury verdict on the fact of damage "must be allowed to stand unless all reasonable men, exercising an unprejudiced judgment would draw an opposite conclusion . . ." (282 U.S. at 556). This rule is fully applicable in this case; The finding of damage in fact and the quantum of damage is amply supported by an abundance of evidence from a variety of sources.

Olson Farms contends that the sole evidence of the "fact of damage" was supplied by plaintiffs' expert witness, Dr. Rondo Christensen (Pet. pp. 6, 11). His testimony did supply evidence of the fact of damage; but it was by no means the sole source of such evidence.

This Court has held that a jury could find the "fact of damage" as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure the plaintiffs' business, *Bigelow v. RKO Pictures*, 327 U.S. 251 (1946). This rule is directly applicable in the instant case. "The mere unlawful combination over a period of time to eliminate competition is proof of damage, *Fox West Coast Theater Corp. v. Paradise Bldg. Corp.*, 264 F.2d, 602 (9th Cir. 1957); *Union Carbide and Carbon Corp. v. Nisely*, 300 F.2d 561 (10th Cir. 1961).

Although petitioner did not raise the issue, the court below found there was sufficient evidence of the fact of damage.[9a] The court below found that there

[9a] See statement of issues in Petitioner's brief in the lower court.

was ample evidence that Olson Farms conspired to fix depressed producer and wholesale prices (Pet. B-6, see also Pet. B-11). These acts, together with the other acts of monopolization referred to above (*supra* pp. 5-8) had, as their inexorable effect, the damaging of plaintiffs' business. The court of appeals stated (Pet. B-9):

> We think there was sufficient evidence of the *fact* that the plaintiffs did sustain some damage since there was ample statistical data and expert testimony describing depressed producer prices and the necessary concomitant-lost profits. As to the *quantum* of damage, the plaintiffs were under no burden to establish it with mathematical precision so long as the extent of damage was not left to jury speculation [citations omitted]. Without itemizing the testimony bearing on the damage question, our study of the voluminous record, consisting of some 7,500 pages of testimony, convinces us that the state of the record is such as to permit the jury to find and infer that plaintiffs did suffer legal injury.

In light of this finding, the unchallenged findings of the court below that Olson conspired to depress egg prices and to monopolize, and the above authorities, there is ample evidence of the "fact of damage."

Petitioner contends that "the appellate court failed to separate the legal basis for plaintiffs' damage claim (establishing the *fact* of damage) from the maze of evidence offered by plaintiffs to show the *quantum* of damage allegedly sustained" (Pet. p. 11). This contention entirely disregards the findings of the Court that Olson "succeeded in thus depressing . . . egg prices" (Pet. B-4), that "Olson Farms was acting in concert

with others to depress the prices paid to Utah-Idaho egg producers" (Pet. B-6); and that Olson dominated the Utah-Idaho egg market and "intended to control the egg producer paying price and, therefore, dominate the market . . ." (Pet. B-6).[10]

In sum, petitioner is flatly in error in stating that "[w]ithout Dr. Christensen's theory, there is no foundation for any showing that plaintiffs were in fact damaged" (Pet. p. 11).

2. The "question presented" for review by petitioner in its Petition for a Writ states: "Did the Tenth Circuit Court of Appeals follow decisions of this Court in considering the issue whether damage in fact had been proven?" (Pet. p. 2). Petitioner, however, argues a number of other issues in addition to the fact of damage, such as the sufficiency of the evidence as to the quantum of damages and the sufficiency of the evidence demonstrating that the Utah market area is a separate market. The latter two issues, however, are not properly before the Court. Rule 23(1)(c) of this Court's rules provides: ". . . Only the questions set forth in the petition or fairly comprised therein will be considered by the Court." Therefore, the petitioner is precluded from raising any issue as to the quantum of damage and as to market definition. *J. I. Case Co. v. Borak*, 377 U.S. 426, 428-29 (1964); *General Talking Pictures Corp.*

[10] Olson Farms contends that the court of appeals must simply have thrown "up their hands" and guessed that there was sufficient evidence of the fact of damage (Pet. p. 11). Certainly there is a strong presumption that the court of appeals properly and fully discharged its obligations of review, particularly in light of the fact that Olson Farms filed two briefs before that court totaling over 145 pages, and the plaintiffs filed a brief in that court containing 102 pages.

v. Western Electric Co., 304, U.S. 175, 177-78 (1938).

3. In any event, petitioner is in error in contending that there was inadequate evidence of the quantum of damage. Neither *Bigelow v. RKO Pictures*, 327 U.S. 251 (1946), nor any other case, holds that the so-called "yardstick" and the "before-after" tests are the only proper tests for measuring damages, as the petitioner suggests (Pet. pp. 10, 11). A number of cases have held that experts' opinions may be used to prove damages in antitrust cases. See *e.g. Union Carbide and Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), appeal dismissed, 371 U.S. 801 (1961); *Atlas Building Prod. Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 214 (9th Cir. 1964); *Banana Distributors v. United Fruit Co.*, 162 F. Supp. 32, 47 (S.D.N.Y. 1953); see also, Von Kalinowski, *Anti-Trust Laws & Trade Regulations, Section* 115.01 [3].

Plaintiffs could not have used the "before-after" method, in any event, because there was evidence that the conspiracy commenced when Olson first entered the market area in 1966 (see *e.g.* App. 483-84, 1032, 1943; Tr. 6575-73). There is also evidence that the conspiracy continued subsequent to the filing of the complaint on December 21, 1971. Accordingly use of this method of computing damages was not possible. Certainly there was not a shred of evidence at trial showing that the conspiracy had ended. A conspiracy is presumed to continue until affirmative evidence of its discontinuance is adduced. *United States v. Consolidated Laundries*

Corp., 291 F.2d 563 (2nd Cir. 1961). Neither was evidence of discontinuance of the conspiracy adduced at the hearing before the trial court in September, 1974, after which injunctive relief was entered.

In any event, the "before-offer" test is not likely to render a valid measure of damages in an industry such as agriculture where prices tend to gyrate wildly over a period of time.

The method of proving damages employed by plaintiffs was, in fact, a variant of the "yardstick" theory. Plaintiffs relied on the well-established theory that in a competitive market the price of a perishable agricultural commodity in a deficit area should equal the producer price in a surplus area plus the necessary transfer costs from the surplus to the deficit area. Both plaintiffs' and defendant's experts agreed on the basic theory—they simply disagreed on the amount of the transfer costs (see defendant's expert's testimony at Tr. 6737-6741 and see the damage exhibit of defendants D-8, p.2 employing the same theory). Other witnesses also supported the same theory, although they did not know what costs in addition to freight should be included in the transfer costs (App. 398, 461-62, 540-41). Petitioner is simply in error in contending that there is no basis for stating that Utah producers had never received anything more than the cost of freight over the California producer prices (Pet. p. 6); and it cites no authority whatsoever for that proposition (see Pet. p. 7).

It is misleading for Olson to assert that the plaintiffs compared "prices at two different functional levels

—Utah producers and California distributors" (Pet. p. 7) and that Dr. Christensen "postulated that a Utah distributor should be willing to pay a Utah egg producer the same as a California producer plus all of the costs incurred in buying eggs from California distributors and then transporting them to Utah . . ." (Pet. p. 6). Dr. Christensen's analysis went solely to determine actual transfer costs on the basis of the actual experience of the conspirators. The sole difference between Olson's and plaintiffs' damage theories was that Olson contended that the only transfer cost incurred was the cost of transportation—a proposition shown to be false by the long-time experience of all those who, in fact, imported eggs, including Olson itself (see Pl. Ex. 90, Tr. 1784).

Plaintiffs' computation of transfer costs did not compare prices received by Utah producers and California distributors. The comparison was between Utah producer prices and the California producer prices plus "transfer costs" to Utah as taken from the actual records of Olson Farms and its co-conspirators, Safeway, Inc., and Associated Food Stores, all of whom imported eggs from southern California over extended periods of time producer prices and the California producer prices plus and in substantial amounts.[11] Olson cannot now disavow its own theory.

In short, the evidence was sufficient to meet the

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[11] To arrive at damage calculation, it was then necessary to deduct the amount by which California producer prices were below Utah producers prices, when they were, from the "transfer costs."

standard stated in *Zenith Radio Corp v. Hazeltine Research, Inc.*, 395 U.S. 100, 124-25, (1969):

> 'The jury may make a just and reasonable estimate of the damages based on relevant data, and render its verdict accordingly. In such circumstances, 'juries are allowed to act upon probable and inferential, as well as direct and positive proof' [citations omitted]. Any other rule would enable the wrongdoer to profit by his wrong-doing at the expense of his victim . . . Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of recovery' . . .

4. Olson's contention that an error was committed in defining the Utah market area as a geographical market area under Section 2 of the Sherman Act is not encompassed within the question presented for review. In any event, it is clear that the term "any part of the trade or commerce among the several states . . ." as used in Section 2 of the Sherman Act has the same meaning as the term "line of commerce" under Section 7 of the Clayton Act, *United States v. Grinell Corp.*, 384 U.S. 563 (1966). There was abundant evidence to support the jury's finding that Utah constituted a distinct market area. It was the "target area" of Olson's monopolistic scheme; it was recognized by industry and governmental agencies as a market area in governmental and industry reports (see Pl. Ex. 286; and Pl. Ex. 188); the perishability of eggs and the deteriorating effect of transportation on eggs also tended to create a local market; there were substantial transfer costs involved

in transporting eggs from the nearest surplus area; the Utah market area constituted an area of effective competition; the direct routes of all the independent distributors (not those associated with chain stores) were solely within the Salt Lake-Provo-Ogden areas of Utah; and all of the Utah produced eggs were sold to local Utah distributors.

There certainly is no anomaly in using the price of eggs paid producers in California plus the transfer costs as the basis for computing damages. It is undisputed that the southern California area was the nearest area from which surplus eggs could be obtained in order to fill the needs of the Utah market area, and a market area need not have impermeable boundaries. In any event, a market definition is irrelevant to the section 1 claim.

CONCLUSION

We respectfully submit that the issue of the sufficiency of the evidence of the fact of damage raises no question warranting review by this Court. The issues concerning the measure of damages and the market definition were not properly raised in the questions presented, and, therefore, should not be considered on this Petition. In any event, they do not warrant plenary review because they raise no novel questions and pre-

sent no conflict among the courts of appeals. Accordingly, the respondents submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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